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No. 96-1527

In The

Supreme Court of the United States

October Term, 1996

AMRUT N. PATEL and SITA PATEL,

Petitioners,

vs.

JAMES F. PENMAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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FURTHER REASONS FOR GRANTING THE WRIT

I.

THE STATE CONSTITUTIONAL CLAIM DID NOT "SUBSTANTIALLY PREDOMINATE" OVER THE FEDERAL CONSTITUTIONAL CLAIM.

The San Bernardino Municipal Code gave officials the summary power to enter onto petitioners' property and close their motel for purposes of nuisance abatement. (Petition, p. 9a). The same statute also requires that "immediately after" the abatement, the City provide property owners the opportunity of a post-deprivation hearing. (Petition, p. 9a).

City officials summarily entered onto petitioners' property, pursuant to an administrative warrant, inspected the motel and closed it, relocated the tenants living at the motel, and "meaningfully interfered" with petitioners ownership rights to the property after the closure of the motel. (Petition, pp. 8a-12a).

The City never provided petitioners with a post-deprivation hearing. (Petition, pp. 24a-25a).

While the two claims "are not in anywise necessarily connected", *Dewey v. Des Moines*, 173 U.S. 193, 198, 19 S. Ct. 379, 381, 43 L. Ed. 665 (1899), and are analytically severable, respondents have not addressed petitioners central claim, that 28 U.S.C. § 1367(c)(2) must be qualified by the Court's time-honored constitutional doctrine that holds that a federal court may resolve a case solely on the basis of a pendent state-law claim, and that in fact the court should usually do so in order to avoid federal constitutional questions. (Petition, p. 15) (*citing Pennhurst State School & Hosp. v. Holderman*, 465 U.S. 118,

104 S. Ct. at 917, 79 L. Ed. 2d 67 (1984); *Schmidt v. Oakland Unified School District*, 457 U.S. 594, 102 S. Ct. 2612, 73 L. Ed. 2d 245 (*citing Hagans v. Lavine*, 415 U.S. 528, 546, 94 S. Ct. 1372, 1383, 39 L. Ed. 2d 577 (1974) and *United Mineworkers of America v. Gibbs*, 86 S. Ct. 1130 (1966)).

The doctrine is of such importance that this Court has refused to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised in a petition by the parties. *Neese v. Southern Railway Company*, 350 U.S. 77, 76 S. Ct. 131, 132.

A remand to the District Court to consider the effect of 28 U.S.C. § 1367(c)(2) in light of this issue is in order on this ground alone.

Litigating the inverse condemnation claim in state court does not preclude petitioners from bringing a subsequent federal takings claim in federal court, but litigating the state claim in this action will preclude a further action. *England v. Louisiana State Bd. of Med. Exam.*, 375 U.S. 411, 417, 84 S. Ct. 461, 465 (1964); *Dodd v. Hood River County*, 59 F.3d 852, 859-60 (9th Cir. 1995).

Under California law, the District Court sitting without a jury would first determine liability on the state inverse condemnation claim before liability would be determined on the procedural due process claim. (Respondent's Brief, p. 6).

Moreover, the issue of whether the closure of the motel itself was "justified" has not been waived.

A trial was held only on the issue of procedural due process, since petitioners substantive claims were dismissed prior to trial. (Petition, p. 13a).

Petitioners abandoned their claim that their rights to procedural due process were violated by the lack of the City providing a pre-deprivation hearing before the motel was closed, and the sole issue at trial was whether the City provided a prompt post-deprivation hearing after the closure of the motel. (Petition, pp. 13a-14a).

"[T]he categories of the Due Process Clause under the United States Constitution are distinct," and, "[w]ere the rule otherwise, the Clause would be reduced to a mere tautology." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543, 105 S. Ct. 1487, 1493 (1985).

Respondent overlooked petitioners quote by the California Supreme Court to the effect that "[B]oth eminent domain proceedings and inverse condemnation actions implement the constitutional rule that private property may not be 'taken' (U.S. Const., 5th Amend.) or 'taken or damaged' (Cal. Const., Art. I, § 19) for public use without just compensation." (Petition, p. 16) (*citing San Diego Gas and Electric Company v. The Superior Court of Orange County*, 55 Cal. Rptr. 2d 724, 752 (Cal. 1996)).

And California law is settled that one of the modalities of an inverse condemnation action under Article I, § 19 of the California Constitution is when, "a public entity . . . physically invades that property in any tangible manner." (Petition, p. 16) (*citing San Diego Gas and Electric Company*, 55 Cal. Rptr. 2d at 753).

The San Bernardino Municipal Code authorized an unwanted physical occupation of petitioners' property, amounting to a per se taking. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533, 112 S. Ct. 1522, 1531 (1992).

Petitioners also contend that the City's post-closure actions,

denying petitioners the right to reopen the motel, "does not substantially advance legitimate state interests [and] denies [petitioners] economically viable use of [their] property." *Landgate, Inc. v. California Coastal Commission*, 97 DJ DAR 1345 (2/11/97) (*citing Lucas v. South Carolina Coastal Council*, 505 U.S. 1015-16 (1992)).

If the District Court first holds a bench trial on the state claim, it may resolve factual issues obviating the need of a trial on the federal due process claim.

Resolution of whether the deprivation was justified may also resolve an issue of damages related to the federal procedural due process claim. *Carey v. Piphus*, 435 U.S. 262, 98 S. Ct. 1042, 1052 (1978) ("[M]orevoer, where a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributed to the justified deprivation rather than to deficiencies in procedure. But as the Court of Appeals held, the injury caused by a justified deprivation, including distress, is not properly compensable under § 1983. This ambiguity in causation, which is absent in the case of defamation per se, provides additional need for requiring the plaintiff to convince the trier of fact that he actually suffered distress because of procedural due process itself.").

Respondent's argument that in other respects, the state claim "substantially predominates" over the federal claim, also misapprehends the Court's precedents and the holding of the California Supreme Court.

1. As stated previously, the issues arise from a common nucleus of facts that forms the necessary Article III subject matter jurisdiction under 28 U.S.C. § 1367(a).

2. While the legal issues are analytically severable, that in itself does not make them "distinct and seperable" from the federal claims for purposes of 28 U.S.C. § 1367(c)(2). (Respondent's Brief, p. 4) (*citing Soliday v. Miami County*, 55 F.3d 1158, 1165 (6th Cir. 1995)).

In fact, if the claims arise out of a common factual nucleus, logically and in the interest of judicial economy, one would expect to litigate a takings claim and procedural due process claim together. *Dewey v. Des Moines, supra.*

II.

THE STATE CONSTITUTIONAL CLAIM DOES NOT PRESENT "NOVEL AND COMPLEX" ISSUES OF STATE LAW.

Since as stated previously, the California Supreme Court and other state appellate courts have definitively ruled and clarified that a case such as this one falls within the category of Article I, § 19 of the California Constitution, there is no need for the District Court "to attempt to predict the future course of state law when there is no reasonable basis for doing so." (Respondent's Brief, p. 5).

Respondent has misstated the state law on the subject.

California courts have recognized that the "taken or damaged" clause of Art. I, § 19 of the California Constitution does not always require a measure of damages for "just compensation" based on "fair market value". *Housley v. City of Poway*, 20 Cal. App. 4th 801, 807-08 (1993) ("[T]he courts have recognized, however, that just compensation may, under unusual circumstances, require an application of a different measure.").

III.

THE STATE CONSTITUTIONAL CLAIM DOES NOT PRESENT "COMPELLING REASONS" FOR DECLINING JURISDICTION.

As stated previously, the fact that the District Court would sit as the trier of fact tends to favor petitioners argument that resolution of the state law claim will obviate the need to litigate the federal constitutional claim.

Also as argued, the issue of whether the deprivation was "justified" bears on resolution of the federal constitutional claim for damages.

The unique facts in this case, provide the "exceptional circumstances" and "other compelling reasons" to exercise jurisdiction over the state law claim, even under the Ninth Circuit's standard of discretion.

IV.

THE COURT SHOULD CLARIFY THE STANDARD OF DISCRETION TO DECLINE JURISDICTION UNDER 28 U.S.C. § 1367(c).

Respondent at least concedes that "[t]here are in fact minor disagreements among the circuits about the precise standard for dismissal of state law claims under § 1367." (Respondent's Brief, p. 1-2).

The Court does not require a complete circuit split to clarify an important area of federal law. *Matsushita Electric Industrial Co., Ltd. v. Epstein,* 515 U.S. __ (1995).

This is all the more compelling under a congressional statute conferring subject matter jurisdiction to the federal courts. (Petition, pp. 10-11).

Respondent has misapprehended petitioners argument.

The question is not whether "discretion comes into play only after the district court finds one of the § 1367(c) factors applicable" (Respondent's Brief, p. 3), but rather defining the proper scope of discretion under § 1367(c), which as petitioners argue, is an "exceptional circumstances" standard.

The statute's explicit language and legislative history appear to mandate the same conclusion, and awaits clarification by the Court to finally determine the matter.

V.

THE FOURTH AMENDMENT CLAIM UNDER THE FOURTEENTH AMENDMENT PROVIDES PETITIONERS A SEPARATE EXPLICIT TEXTUAL SOURCE OF CONSTITUTIONAL GUARANTEE THAT WAS NOT PREEMPTED BY THEIR FIFTH AMENDMENT CLAIM UNDER THE FOURTEENTH AMENDMENT.

Petitioners clearly understand the Ninth Circuit's opinion as it is written.

The issue as phrased, derives from the explicit language of the Court in *United States v. James Daniel Good Real Property*, __ U.S. __, __, 114 S. Ct. 492, 499 (1993) ("[T]he proper question is not which Amendment controls but whether either Amendment is violated.").

While the court has "repeatedly rejected the view that the applicability of one constitutional amendment preempts the guarantees of another", *United States v. James Daniel Good Real Property* at 499, the Ninth Circuit held otherwise. (Petition, p. 16a, n. 7) ("[b]ecause the Patels' substantive due process claim is clearly preempted by the Fifth Amendment, we do not analyze whether the Fourth Amendment might also preempt their substantive due process claim.")

The Ninth Circuit should have separately analyzed petitioners' substantive due process claim under the Fourth Amendment, and then independently determine under the standard of the "explicit textual source" whether summary judgment was proper.

As the Ninth Circuit stated, this case arises out of circumstances similar to those involved in *Armandariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). (Petition, p. 6a, n. 1) *See also Macri v. King County*, 97 DJ DAR 5072, 5075, n. 5 ("[O]ur decision in *Armanderiz* has been affirmed by a three judge panel on facts virtually identical presented in *Armanderiz*. *Patel v. Penman*, No. 95-55213, 1996 WL 734757 (9th Cir. Dec. 26, 1996)).

The Ninth Circuit's analysis in this case tracks the exact analysis in *Armanderiz*, (Respondent's Brief, pp. 9-10), except that in *Armanderiz*, the Ninth Circuit analyzed plaintiffs' substantive due process claim under both the Fourth and Fifth Amendment and found it was preempted by the explicit textual sources since the specific amendments were not specified in the pleadings. (Petition, p. 16a, n. 7), *Armanderiz*, 75 F.3d at 1324, n. 9.

The Court's doctrine that a generalized due process claim must be analyzed under an explicit constitutional guarantee, is

no more, than a "guide for analyzing [a plaintiff's claims]", and not a new pleading requirement imposed on plaintiffs in a § 1983 action. *Albright v. Oliver,* 510 U.S. 266, __, 114 S. Ct. 807, 813 (1994) (Rehnquist, C.J. for plurality) (*quoting Graham v. Conner,* 490 U.S. 386, 395 (1989)).

Respondent's argument that the issue was never presented to the Ninth Circuit has no merit, since it is not a jurisdictional concern, but presents at most a prudential concern that is adequately addressed by the complete factual and legal record in *Armanderiz* and in this case. *Youakim v. Miller,* 425 U.S. 231, 234; *Webb v. Webb,* 451 U.S. 493, 500, 101 S. Ct. 1889, 1893, 68 L. Ed. 2d 392 (1981).

Under the "mere enlargement doctrine", "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Bankers Life and Cas. Co. v. Crenshaw,* 486 U.S. 71, 76, n. 2, 108 S. Ct. 1645, 1650, n. 2 (1988).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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